

IN THE
Supreme Court of the United States

JOHN DAVID BATTAGLIA,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI AND MOTION TO STAY EXECUTION**

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QUESTIONS PRESENTED

1. Is certiorari review proper where the petitioner does not identify any flaw in the appellate court's analysis rejecting Battaglia's appeal of the district court's decision?
2. Is certiorari review warranted if the federal district court did not abuse its discretion denying Battaglia's motions for investigative services and a stay because the court held, pursuant to this Court's precedent, that any additional evidence could not be considered?

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

A Texas jury convicted John David Battaglia of capital murder and sentenced him to death for the horrific murders of his daughters Mary Faith and Liberty Battaglia. Both state and federal courts continually upheld his conviction and sentence throughout the postconviction litigation process. He is currently scheduled to be executed on February 1, 2018. Battaglia was originally scheduled to be executed on March 30, 2016, but the Fifth Circuit stayed Battaglia's execution and appointed new counsel so that he could develop in state court a claim that he is incompetent to be executed. *Battaglia v. Stephens*, 824 F.3d 470 (5th Cir. 2016). An evidentiary hearing was held in the state trial court on November 14 and 15, 2016, during which four experts—two court-appointed and one for the State and defense each—testified about Battaglia's competence. The state trial court found that Battaglia failed to prove by a preponderance of the evidence that he is incompetent. On September 20, 2017, the Texas Court of Criminal Appeals (CCA) affirmed the trial court's decision. *Battaglia v. State*, — S.W.3d —, 2017 WL 4168595 (Tex. Crim. App. 2017).

Battaglia then filed a motion for investigative services and motion to stay his execution in the federal district court. He claimed that investigative services—specifically, services for a mitigation expert to acquire background

and historical information—were necessary so that he could prepare a § 2254 petition challenging his competency to be executed. The federal district court denied the motion for investigative services, and because the motion to stay was predicated on the former, the court also denied the motion to stay. *Battaglia v. Davis*, 2018 WL 550518 (N.D. Texas Jan. 24, 2018). The Fifth Circuit affirmed that decision holding that the district court did not abuse its discretion denying Battaglia’s motions. *Battaglia v. Davis*, No. 18-70002.

The Fifth Circuit’s opinion is correct. Battaglia fails to identify any flaw in the court’s legal analysis. The investigative services he seeks are not “reasonably necessary” because (1) the federal court is precluded from considering any new evidence under *Cullen v. Pinholster*,¹ (2) Battaglia received all the procedural due process he was entitled to in the state court; (3) additional evidence would only support a meritless claim, as the CCA determined; and (4) any historical “mitigating” evidence would be irrelevant to his current competency or, at best, would merely supplement the substantial evidence the state court already considered. Finally, Battaglia has not shown that he is entitled to a stay of execution. Certiorari review should be denied.

¹ 563 U.S. 170 (2011).

STATEMENT OF FACTS

I. Facts of the Competency Hearing

The CCA summarized the facts of Battaglia's competency hearing as follows:

The trial court held an evidentiary hearing to determine Battaglia's execution competency. Only one non-expert testified at Battaglia's competency hearing—Shirley Griffin, the library supervisor at the Polunsky Unit at TDCJ. The other four witnesses were the four experts who had evaluated Battaglia for execution competency—Dr. Diane Mosnik (hired by the defense), Dr. Timothy Proctor (hired by the State), Dr. Thomas Allen (court-appointed), and Dr. James Womack (court-appointed).

A. Shirley Griffin

Shirley Griffin is the library supervisor at the Polunsky Unit at TDCJ, which is the maximum security unit housing the death row inmates. Ms. Griffin has been employed with TDCJ for 19 years. For two of those 19 years she was a correctional officer assigned to death row. Ms. Griffin testified that she knew Battaglia from her time as a correctional officer, law library officer, and then as the law library supervisor. She saw Battaglia possibly three days a week as the law library officer. She testified that, on many occasions, she would receive and fill requests for legal materials for Battaglia. Through Ms. Griffin's testimony, the State showed that Battaglia requested and received, on March 18, 2016, (which was 12 days before his first-scheduled execution), the following cases pertaining to execution competency: *Panetti v. Quarterman*,² *Wood v. Quarterman*,³ and *Mays v. State*,⁴ all discussed in detail above.

² 551 U.S. 930 (2007).

³ 572 F.Supp.2d 814 (W.D. Tex. 2008).

⁴ 476 S.W.3d 454 (Tex. Crim. App. 2015).

B. Dr. Diane M. Mosnik, Ph.D.

Dr. Mosnik is a clinical neuro-psychologist. She was hired by the defense to evaluate Battaglia and render her opinion as to his competency to be executed. Dr. Mosnik stated that she is currently in private practice, which is comprised essentially of diagnostic assessments of neurologic and psychiatric conditions. She also stated that she has served as an expert witness for federal and state court criminal proceedings, and has been hired by the defense on forensic cases. She testified that she has evaluated over 50 defendants for competency to be executed. According to the list of presentations given by Dr. Mosnik, as shown on her Curriculum Vitae, much of her expertise lies in the field of Dementia and Alzheimer's Disease. Moreover, she has extensive publications on neuropsychology, specifically including schizophrenia.

In her written report, Dr. Mosnik opined that Battaglia believes he is innocent and discusses his innocence as part of a complex delusional cover-up scheme—Battaglia believes he is being executed “for the purpose of preventing him from disclosing [others’] illegal behavior and machinations.” She concluded that Battaglia suffers from Bipolar Disorder and Delusional Disorder and, as a result, he does not have the capacity to rationally understand the connection between his crime and his punishment, and, as such is not competent to be executed at this time.

At the evidentiary hearing, Dr. Mosnik confirmed that, before she saw Battaglia in person she reviewed “a voluminous amount of records”—some prior psychological examinations; the TDCJ Health Archives; interviews; and correspondence regarding letters that were written by Battaglia to both attorneys and the courts. Dr. Mosnik testified that Battaglia’s test scores showed “no indication of malingering or feigning on the M-FAST scale,” and no indication of malingering on the SIMS (Structured Interview for Malingered Symptomatology) test. The other personality tests she administered also resulted in no significant indication of malingering or feigning. She concluded that she does “not believe that he is faking it,” and she does not believe an intelligent person could fake the malingering tests.

Dr. Mosnik admitted at the hearing that Battaglia “is aware that he has an execution date scheduled and is scheduled to be executed,” and that he is aware that he is going to be executed because he was convicted for having murdered his daughters. However, she continued to maintain that Battaglia does not have a rational understanding of the connection between himself doing the crime that he was convicted of and his impending execution. Rather, she said, he believes that he is being executed to quiet him from releasing information that can indict or get other people in trouble—information about “inappropriate sexual liaisons occurring between attorneys and judges and prosecutors, the DA’s office.”

C. Dr. Timothy J. Proctor, Ph.D.

Dr. Proctor, a licensed psychologist who is board certified in forensic psychology, was hired by the State to evaluate Battaglia for execution competency. Over the course of eight hours, Dr. Proctor conducted a clinical interview, a mental status evaluation, behavioral observation, and psychological testing. Dr. Proctor also reviewed all of Battaglia's medical and psychological records, court documents, test results, the trial record, audio/video interviews of Battaglia, and the other experts' reports. In his written report, Dr. Proctor opined that Battaglia did not appear to be malingering. Dr. Proctor concluded that Battaglia's beliefs “appear to be the product of a vast and complicated delusional system.” Unlike Dr. Mosnik, however, Dr. Proctor admitted, as noted by the trial court in its findings, that it is possible for an intelligent person to “feign delusions.” Dr. Proctor concluded in his written report that Battaglia was “presently incompetent for execution because, although he is aware of the State's rationale for his execution, he does not have a rational understanding of such.”

Dr. Proctor testified consistently with his written report, noting that Battaglia described having conspiracy-based delusions involving cover-ups, tax fraud, prostitution, child molestation, drug use, money laundering, and misconduct among attorneys and judges. Battaglia also told Dr. Proctor that he had doubts that he was at his apartment on the night his daughters were killed. He does not recall doing it, and if he did do it, he believes it was

because someone drugged him and forced him into doing it. Nevertheless, Dr. Proctor concluded that Battaglia knows he is currently set for execution; he knows the execution is imminent, and he knows the reason that the State is saying he will be executed—because he was convicted of capital murder for shooting his two daughters. But, said Dr. Proctor, because of the conspiracy that Battaglia was talking about, Battaglia does not have a rational understanding of why he is being executed.

D. Dr. Thomas G. Allen, Ph.D.

Dr. Allen was one of the two experts appointed by the trial court to evaluate Battaglia for execution competency. According to Dr. Allen's Curriculum Vitae, he attained his Ph.D in psychology in 1984, and he has been practicing "forensic psychology since 1987 in Texas District Courts." He is in private practice as the Director of Clinical Services at the University Park Hospital in Tyler, Texas. He saw Battaglia on two occasions for two hours each time. He also reviewed video interviews of Battaglia, court filings, jail mail, letters, Battaglia's mental health, jail, and TDCJ records, and testing results.

Dr. Allen's written report noted that Battaglia had no psychiatric admissions prior to or subsequent to his capital murder trial; that he is not on any psychotropic medications; and he was determined to be competent to stand trial. Dr. Allen observed that Battaglia probably functioned in the bright-normal to superior range of intelligence; that he is very well-read; and that he did not exhibit any signs of Schizophrenia or Bipolar Disorder, despite having been diagnosed with Bipolar Disorder in the past. Dr. Allen noted that Battaglia talked about a complex delusional system involving conspiracies and exhibiting extreme homophobia. "His delusions included a complex web of plots against him by the legal system to include judges and attorneys, and the web included homosexual attorneys, judges and prosecutors in collusion to deprive him of his legal rights and to kill him." Dr. Allen observed that Battaglia ranted about his ex-wives and their conspiracy with the "homosexual legal community." The conspiracy against him also involved "child molesters" and drug-using attorneys, and prosecutors. He was very accusatory about both ex-wives indicating not only

homosexual affairs but a high level of promiscuity. He referred to them as “bitches,” “cunts,” and “whores” who were out to get him, ruin his life, and have him killed. Dr. Allen noted that Battaglia had a history of problems with impulse control whenever he was frustrated with his ex-wives. Moreover, in his written report, Dr. Allen stated that “an important indicator of malingering is melodramatic presentation that typically involves claims of hallucinations, delusions and a variety of nonsensical symptoms that appear to be no more than a caricature of genuine mental illness.” While he believed Battaglia to be dramatic, he said Battaglia was not *melodramatic* in his recitation that his trial was a “sham” and the jury was “blood thirsty” and “rigged” by the judge, the prosecutor, and his defense counsel. Again, however, Dr. Allen noted in his report that Battaglia is currently aware that he was convicted of Capital Murder, and that his execution is imminent; “[H]e clearly stated ‘in a month I’ll be dead or still fighting this’ and this examiner took the statement to indicate he was aware of the execution and its imminence.” But, Dr. Allen believed that Battaglia’s complex delusional system appears to be impairing a rational understanding of the reason for the execution.

Dr. Allen testified at the evidentiary hearing. He reiterated that Battaglia is aware that he was convicted of murdering his children and that he was sentenced to death and his execution is imminent, but he is convinced that his trial and conviction were a sham. Dr. Allen admitted that most defendants maintain that the system is “rigged” and that they are innocent. Dr. Allen also testified that Battaglia told him he was drugged; that he did not recall the murders; that this was all a conspiracy; and that his daughters may not even be dead. Dr. Allen observed that Battaglia believed that his ex-wives, the prosecutors, the defense attorneys, and the judges have all conspired against him to prevent him from proving his innocence, and that the conspiracy involves the KKK, child molesters, and homosexual lawyers.

On the other hand, Dr. Allen expressed his “concerns and skepticism” that, over the last 14 ½ years, the TDCJ records did not reflect any “psych referrals.” He said that “every mental status report that [he] looked at showed normal limits.”

[F]unctioning, he's not complaining to anybody in the prison system about any of these delusions that I could find. And you would think that if he were that severely delusional, surely he would be having psych visits. And he told me he's not crazy. He said TDC told him he wasn't crazy, didn't need any medications. And no psych referrals, that kind of bothers me. And I find it inconsistent with what my interview was giving me, especially in the past because past doctors and testing showed that they opined that he suffered from bipolar disorder. None of that is documented in TDCJ records after 14 and a half years, and I didn't see any of those symptoms when I saw him. He was jovial and not complaining of depression or suicide or anything.

Dr. Allen also seemed to waver on whether Battaglia was malingering. He said that he cannot prove that Battaglia is *not* malingering, but he also cannot prove that Battaglia *is* malingering. Dr. Allen stated that Battaglia "knows why he's being executed, the imminence of the execution," and that Battaglia knows "why he's sentenced to be executed. He knows what he did. He can define capital punishment." Dr. Allen believes that Battaglia "knows he's the murderer."

In fact, Dr. Allen admitted on cross-examination that, after reading more records, he was changing his conclusion to one that was not as certain as before. After finding no "sign of mental illness or anything in the TDCJ records," Dr. Allen could only conclude that Battaglia "may" not have a rational understanding of why he is being executed.

Moreover, when questioned about his opinion regarding Battaglia having read the *Panetti* case while on death row, Dr. Allen said that, knowing Battaglia had read the *Panetti* case "would give you pause.... And we're dealing with someone who's reading high-level material, Heidegger and Buddhism. In addition to that, you know, if he can digest things like *Panetti*, you have to wonder the extent to which he's styling his presentation, let's say, in terms of his negative response bias."

E. Dr. James Womack, Ph.D.

Dr. Womack was the fourth expert to testify. He was appointed by the court to evaluate Battaglia. Dr. Womack is a licensed psychologist specializing in criminal forensics. He has a Ph.D. in Counseling Educational Psychology from the University of Mississippi, and he worked for the Federal Bureau of Prisons for 21 years evaluating inmates for competency to stand trial and/or mental state at the time of the alleged offense. Unlike the other three experts, Dr. Womack is the only psychologist whose practice has been almost exclusively in forensic psychology.

He interviewed Battaglia on two separate occasions, and, although Dr. Womack did not conduct his own testing, he reviewed court documents and medical records, jail mail, and the testing done by the other experts. In the first of two written Psychological Evaluation reports, Dr. Womack concluded as follows:

It is opined Mr. Battaglia is competent to be executed, per Texas Code of Criminal Procedure (TCCP), Article 46.05(h)(1)(2). This is based upon the evidence he understands that he is to be executed, that the execution is imminent, and the reason he is being executed. Historical comments by Mr. Battaglia show he had long understood the criteria for competence to executed [*sic*], and his interview comments illustrate he understood them all at the time of this assessment.

In several of Mr. Battaglia's letters from jail he makes comments supporting the opinion he understood he is to be executed and that it was imminent.... During a March 16, 2016, interview with the news media, Mr. Battaglia acknowledged he was in jail for, as he put it, "Charge is capital murder ... for my two daughters Faith and Liberty in 2001." At the end of that interview he spoke of apparent physical life and life after death, when he stated, "One existence and other is just transitioned. Won't be missing something too much, because if I exist now and later, I always exist." He later said, "Of all the possibilities it's (death sentence) not that bad."

During a recorded interview with an unidentified individual in the media on August 16, 2016, Mr. Battaglia demonstrated awareness he is to be executed. He asserted his “adversaries” [were] “causing the deaths of Faith and Liberty;” however, he did not explain how they were killed or by whom.

In two recorded interviews with “Cynthia,” (name on the DVD provided) both of which are undated, Mr. Battaglia voiced knowledge of two of the three elements to be considered competent to be executed.

In the examiner’s interview with Mr. Battaglia he provided clear examples he understands the fact the State intends to execute him and it seeks to do so imminently. He acknowledged he had been convicted of murdering his two daughters but denied having done so. He demonstrated his knowledge the state intends to carry out the execution imminently when he said the execution date is December 7, 2016. At no time did he express any confusion as to these two points. When asked if another party had, in fact, murdered his daughters, would this fact justify that party executed, he stated, “Technically yes.” This answer reflects his knowledge the State has the legal right to carry out the punishment for the conviction of Capital Murder.

Dr. Womack was asked to further evaluate Battaglia since there was such disparity between Battaglia’s emotional presentation during his assessment of Battaglia and his emotional presentation with the other three experts. In his second written Psychological Evaluation report, Dr. Womack opined that Battaglia does *not* have a delusional disorder.

Mr. Battaglia vacillated in his assertions of his innocence, ultimately providing statements that are viewed as inconsistent with a fixed delusion. He also provided inconsistent accounts of certain events and his recall of events. For example, regarding the latter, Dr. Allen indicated Mr. Battaglia holds the delusion his daughters are not dead; however, Mr. Battaglia clearly noted they are deceased when talking to this writer, which is also supported

by other sources.... He informed this writer, "I didn't know they had died until day after [my arrest]." ... He indicated he was arrested after departing the tattoo parlor. He also claimed he did not know something important about the deaths of his children. When asked what the record indicates were the approximate times of his girls' deaths, he stated, "Oh God, I guess in the evening ... I didn't focus on it because I knew I didn't have anything to do with it." This is a very odd assertion for one who expressed great detail about seemingly important life events, especially about being a victim.

... This writer is of the opinion Mr. Battaglia made statements to both Dr. Proctor and this writer believed to be inconsistent with that of a delusional disorder. Dr. Proctor's report notes, "He said that at present he does not believe it was him who did it, and that if he did it was the result of others, such as ex-wives, drugging him against his will." During the second interview between Mr. Battaglia and this writer he was asked how he thought his daughter's deaths were caused, and he stated, "I have a problem with it because I don't know;" however, later he said, "I don't know what happened or, [if I was there,] I was drugged because I was not there physically or, [if there physically not] mentally." This assertion is questionable because he first insists he was not present and then provides a possible exculpatory explanation for why he might have been present, even though his depiction of the day of their murders is seemingly inconsistent with being drugged, and he expressed no rationale for how he could have been drugged. The point is, if he holds a delusional idea of what happened, he most likely would maintain his position he was not present at the time of the murders and argue any evidence to the contrary would have been fabricated, and not offer an exculpatory reason for possibly being present during the murders.

In the second interview Mr. Battaglia seemingly resisted demonstrating his knowledge the State intends to execute him due to the fact he has been convicted of specifically murdering his two girls, even though recent records reflect

such knowledge. Recall his March 16, 2016, news interview whereupon he stated, “Charge is capital murder ... for my two daughters Faith and Liberty in 2001.” When that element of TCCP Article 46.05 was broached with him he knew the first two elements; however, he would say he was being executed only because of the conspiracy against him. While this writer agrees with the assertion that many delusional individuals are resistant to admitting they have mental health problem, if one wanted to simulate a presentation of a delusional disorder one could deny mental illness while asserting highly suspicious claims. It has been suggested Mr. Battaglia likely could not fabricate such an elaborate system of various antagonists and maintain it over the years; however, he is a highly intelligent person who has had the time and motivation to begin creating a complex, paranoid story line that he could have practiced over the years. He also has made exculpatory comments independent of seeming delusional ideas; therefore, this writer is of the opinion he is likely not to have a delusional disorder.

When Dr. Womack testified at the competency hearing, he explained that,

By virtue of the fact that there was no imbalanced mood, no labile mood, you know, switching of moods rapidly, by virtue of the fact that this thinking was highly organized and coherent and easy to follow, it was my opinion that the information he was providing me and his understanding of what he was being asked greatly supported the presence of being competent to understand the Texas Code of Criminal Procedure [46.05].

Dr. Womack confirmed that Battaglia is aware that he is about to be executed; he knows his execution date; and there is no indication of distorted thinking that is preventing him from understanding that he is about to be executed because he murdered his daughters. Rather, said Dr. Womack, Battaglia’s allegations of a conspiracy are common:

No, I—I did not think at that time that there was evidence of delusional disorder. It sounded more like to me—and

common and in my prior work setting—irritable complaints, denunciations of the system and parties in the system, and there was no emotion or affect connected to those comments. He didn't become irritable or overtly angry. And he easily dropped the topic and continued on addressing other things. And I just found that inconsistent in my experience with people with prominent delusional—or full criteria for a delusional disorder—and so I did not believe it was present.

When he testified at the competency hearing, Dr. Womack noted that, “for the first time, at the end of the second interview,” Battaglia demonstrated acute irritability and demonstrable anger and increased speech about the legal system, his medical treatment, and the unavailability of reading materials. Dr. Womack also pointed out that neither he, Dr. Proctor, nor Dr. Allen saw any symptoms of mania depression or bipolar disorder. Dr. Womack agreed that, “consistent with one of the other examiners,” he believed that Battaglia “likely has a personality disorder that’s comprised of multiple features.” He agreed with Dr. Proctor that Battaglia suffers from narcissistic and antisocial features.

But Dr. Womack found it “very problematic” that Battaglia’s “sudden insight” into his “disorder” “emerge[d] out of seemingly a lack of treatment.” Furthermore, Dr. Womack said that he had asked Battaglia why the subject of his competency to be executed was raised in the first place, and Battaglia said, “Because in the writ, I was putting forth claims. I can’t be competent because I don’t understand the connection between the first and second part. Think my charge of cover-up prevents me from understanding why being killed [*sic*].” Dr. Womack ultimately concluded that Battaglia is intelligent and sophisticated enough to be able to fake the tests such that an examiner would believe that he has a delusional disorder or some other mental illness. He also testified that if Battaglia had been reading case law that deals with competency, that could provide information for him to fake delusional disorder symptoms when interviewed by a mental health expert. It was Dr. Womack’s ultimate conclusion that Battaglia does have a rational understanding of why he is going to be executed.

Battaglia v. State, 2017 WL 4168595 at *19–*24 (footnotes and emphases in original).

II. Additional Facts Relevant to Battaglia’s Motion for Investigative Services

The federal district court provided these additional facts relevant to Battaglia’s request for investigative services:

On June 10, 2016, Battaglia filed in this Court a motion to appoint co-counsel Michael Mowla. This motion was granted on June 13.

On June 21, Battaglia filed an *ex parte* motion in this Court for leave to proceed *ex parte* to request investigative and expert funding. Although the certificate of service indicated that the motion was served on Respondent's counsel “using the electronic case filing system,” Battaglia’s counsel filed the motion sealed and *ex parte*, so that it was not actually served on Respondent. Simultaneously with the filing of the motion for leave, Battaglia filed in this court his *ex parte* motion for funding of \$19,500 to obtain expert assistance from Diane M. Mosnik, Ph.D., and \$15,000 for investigative assistance from Nicole Van Toorn, a mitigation specialist. On June 22, this Court issued a memorandum opinion and order on the motion denying leave to proceed *ex parte* because it had not actually been served on Respondent, but included guidance on the procedures required to proceed *ex parte* and on what would be required to make the showing that funding for the sought services was reasonably necessary to the representation of Battaglia before the state court. This order was originally made *ex parte*, but has been opened to both parties following the filing of the instant motions. Although this order assured Battaglia that “this Court would grant funding that is shown to be reasonably necessary to ‘file an Article 46.05 petition’ in the state court,” Battaglia made no further requests for funding in this Court until the instant motions were filed on January 2, 2018.

On July 21, 2016, Battaglia filed a motion in the state district court for leave to proceed *ex parte* on funding requests. In this

motion, Battaglia asserted that if the state court chose not to fully fund the litigation so that he may hire the necessary experts, Battaglia would seek a stay of the state court proceedings to return to federal court to secure the funding. This motion was accompanied by an *ex parte* motion for funding to obtain the services of the same neuropsychologist and mitigation investigator he mentioned in his motion before this Court. In the *ex parte* motion, Battaglia argued that, because of the mitigation investigator's lower hourly rate, appointing the investigator would "be more cost effective to accomplish this necessary work than if counsel undertakes it." The motion also asserted that the additional expert and investigative assistance was needed even though trial counsel had previously obtained expert assistance and developed information concerning Mr. Battaglia's mental health.

On July 29, 2016, the state district court granted \$12,000 for expert assistance of Dr. Mosnik, but denied the motion for funding the mitigation investigator. Despite the assertion otherwise, no further motions for funding were filed in this Court until after the state court proceedings concluded and the current motion was filed on January 2, 2018.

Battaglia v. Davis, 2018 WL 550518 at *1–*2 (citations omitted).

III. Trial, Direct Appeal, and Postconviction Proceedings

Battaglia was convicted and sentenced to death for the murders of his daughters Mary Faith Battaglia and Liberty Battaglia. CR 2, 299, 316-20.⁵ The CCA affirmed Battaglia's conviction and sentence. *Battaglia v. State*, No. 74,348, 2005 WL 1208949 (Tex. Crim. App. 2005).

⁵ "CR" refers to the clerk's record of pleadings and documents filed during Battaglia's trial, followed by page number(s). "SHCR" refers to the state habeas clerk's record, followed by page number(s).

Battaglia filed a state application for writ of habeas corpus in the trial court. SHCR 2. The trial court submitted findings of fact and conclusions of law recommending that Battaglia be denied relief. SHCR 494-534. The CCA adopted the trial court's findings and conclusions and denied Battaglia habeas relief. *Ex parte Battaglia*, No. 71,939-01 at cover and Order.

Thereafter, Battaglia filed a federal habeas petition in the district court. *Battaglia v. Thaler*, No. 3:09-cv-01904 (N.D. Tex.), Docket Entry (DE) 27. A magistrate issued findings, conclusions, and a recommendation that the petition be denied. DE 76. The district court adopted the magistrate's findings, denied Battaglia habeas corpus relief, and denied him a certificate of appealability (COA). DE 81 & 82. Battaglia then filed a COA application in the Fifth Circuit. The lower court denied Battaglia a COA in an unpublished decision. *Battaglia v. Stephens*, 621 F. App'x 781 (5th Cir. 2015). This Court denied Battaglia certiorari review on January 11, 2016. *Battaglia v. Stephens*, 136 S. Ct. 803 (2016).

Battaglia was first scheduled to be executed on March 30, 2016. On February 19, 2016, Battaglia filed a motion with the state trial court: "Defendant's Motion for Appointment of Counsel to Prepare Article 46.05 Motion." The State subsequently filed a motion to dismiss but also requested a hearing. On March 2, 2016, the state trial court judge denied Battaglia's motion and the State's request for a hearing. Battaglia elected not to file a

motion under Texas Code of Criminal Procedure Article 46.05 directly challenging his competency to be executed, or to appeal to the CCA the convicting court's denial of his motions. Rather, Battaglia filed motions for appointment of counsel and a stay in the district court ostensibly with the goal of challenging the Dallas County court's denial of his motion for appointment of counsel. The district court denied his motions. *Battaglia v. Stephens*, 2016 WL 7852338 (N.D. Tex. 2016).

The Fifth Circuit subsequently reversed the district court's decision and granted Battaglia a stay and new counsel so that he could develop a claim that he is incompetent to be executed. *Battaglia v. Stephens*, 824 F.3d 470. An evidentiary hearing was held in the state trial court on November 14 and 15, 2016, following which the state trial court found that Battaglia failed to prove by a preponderance of the evidence that he is incompetent. On September 20, 2017, the CCA affirmed the trial court's decision, eight votes to one. *Battaglia v. State*, 2017 WL 4168595. Battaglia filed a petition for writ of certiorari with this Court off of this denial. *Battaglia v. Texas*, No. 17-7165 (U.S.). The petition is pending.

On January 2, 2018, Battaglia filed a motion for investigative services and motion to stay his execution in the federal district court. *Battaglia v. Davis*, No. 3:16-cv-01687-B (N.D. Tex.), DE 9 &10. The court denied the motions on January 24, 2018. *Battaglia v. Davis*, 2018 WL 550518. The Fifth

Circuit affirmed that decision and denied Battaglia a stay of execution on February 1, 2018. *Battaglia v. Davis*, No. 18-7002.

ARGUMENT

The lower court correctly held that the district court did not abuse its discretion denying Battaglia's motions for investigative services and a stay primarily because any new evidence would not be reviewable. Battaglia has failed to identify any flaw in the lower court's legal analysis that warrants certiorari review.

Investigative services are not reasonably necessary because Battaglia's competency claim was adjudicated on the merits by the state court; thus, the lower court is foreclosed from considering any new evidence under *Cullen v. Pinholster* and § 2254(d). Battaglia also had the opportunity to request additional investigative funds prior to the state court hearing, but he did not. His claimed excuse that he was "hurried" and "thwarted" by the state court, which prevented him from asking the federal district court for the funds, is baseless and contradicted by his prior statements. In fact, his allegation of being "hurried" is a new argument altogether and is arguably waived.

Further, investigative services are not reasonably necessary because in state court Battaglia received all that he was entitled to under Supreme Court precedent, namely funding for an expert and a hearing. Also, these services would only support a meritless competency claim, provide historical

evidence irrelevant to Battaglia's present competency, and, at best, would merely supplement evidence already reviewed by the state court.

Finally, Battaglia is not entitled to a stay of execution. He is not likely to succeed on the merits via new investigative evidence; he will not be irreparably injured because the lower court cannot consider new evidence, and he has received all the assistance he is entitled to; and the State and the public have a substantial interest in finality, particularly considering the delays that have occurred in this case.

I. The Fifth Circuit's Decision Applying the Correct Legal Standard Does Not Merit Review by this Court.

A district court's denial of a motion for investigative funds pursuant to § 3599 is reviewed for an abuse of discretion. *Brown v. Stephens*, 762 F.3d 454, 459 (5th Cir. 2014). In order for Battaglia to have shown that the lower court abused its discretion, he must demonstrate that "it based its ruling on an erroneous view of the law or on a *clearly erroneous* assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (emphasis added); *United States v. Ebron*, 683 F.3d 105, 125 (5th Cir. 2012); *see also McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 953 (9th Cir. 2011) (reversing a district court for abuse of discretion required only where the appellate court is "convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances") (internal quotations

and citations omitted). It follows that Battaglia could not succeed merely because he disputed the district court's ruling. The ruling itself must have amounted to clear error.

With regard to motions for investigative assistance, § 3599 provides that a district court may authorize a defendant's attorneys to obtain investigative, expert, or other services upon a finding that such services "are reasonably necessary for the representation of the defendant." 18 U.S.C. § 3599(f). If the court finds that such services are reasonably necessary, it "shall order the payment of fees and expenses therefor." *Id.* A denial of funding is warranted where it would only support a meritless claim or when it would only supplement prior evidence. *Woodward v. Epps*, 580 F.3d 318, 334 (5th Cir. 2009).

The lower court applied this settled standard in affirming the district court's decision. Specifically, the Fifth Circuit held:

Even if Battaglia received the requested funding and the mitigation specialist "collect[ed] information about Battaglia's . . . present rational understanding of his death sentence," such information would be barred from consideration by the federal courts. It is not an abuse of discretion to deny a motion for funding that would produce only unreviewable evidence.

Battaglia v. Davis, No. 18-70002 at 6. Here, Battaglia's competency claim was adjudicated on the merits by the state trial court, and that decision was affirmed by the CCA. The federal courts are now precluded from considering

new evidence. In *Cullen v. Pinholster*, this Court held that “review under § 2254(d)(1) is *limited to the record that was before the state court* that adjudicated the claim on the merits.” 563 U.S. at 181 (emphasis added). Thus, “evidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.” *Id.* at 185. The Fifth Circuit’s application of this settled standard does not merit certiorari review. Indeed, “[a]ny awarded funding would be a misallocation of federal resources.” *Devoe v. Davis*, ___ F. App’x ___, 2018 WL 341755, *10 (5th Cir. 2018) (citing *Pinholster*).

Further, the Fifth Circuit held:

Here, the state court conducted a two-day hearing into Battaglia’s competency to be executed. He was represented by counsel and the state provided \$12,000 of funding to hire a forensic psychologist, Dr. Mosnik, as a mental health expert. Battaglia was also evaluated by two court-appointed experts in addition to the State’s expert. We see no evidence that the state court violated the procedural requirements set out by *Panetti*. Thus, any habeas petition challenging the state court’s competency finding would have to be cabined to the record that was before the state court, obviating the need for additional investigatory services.

Battaglia v. Davis, No. 18-70002 at 8. In *Panetti*, this Court stated that the basic requirements of a competency determination, per *Ford v. Wainwright*,⁶ “include an opportunity to submit ‘evidence and argument from the prisoner’s

⁶ 477 U.S. 399 (1986).

counsel, including expert psychiatric evidence that may differ from the State’s own psychiatric examination.” 477 U.S. at 949–50 (quoting *Ford*, 477 U.S. at 424, 426–27). In this case, Battaglia was appointed counsel and received funding to hire an expert to counter the State’s and a hearing. He was entitled to nothing more. *Panetti* does not hold that a petitioner must be granted investigative mitigation assistance in addition to funding for an expert.

Therefore, the Fifth Circuit’s application of this Court’s precedent to the facts was not erroneous. Battaglia’s argument, at best, amounts to a disagreement with the lower court’s decision; he fails to demonstrate any misapplication of the law. Therefore, certiorari review is not warranted.

II. Battaglia’s Arguments Challenging the Lower Court’s Ruling Are Unavailing.

In his petition, Battaglia makes several arguments contesting the lower court’s decision. However, they lack merit.

A. Battaglia alleges that he was denied investigative funds because the state court repeatedly pushed to move his case forward. This claim is refuted by the record and his prior statements.

First, as the federal district court acknowledged, Battaglia never asked the federal court for additional funds for investigative services the state court denied. *Battaglia v. Davis*, 2018 WL 550518 at *4 (“Despite the admonitions of the United States Court of Appeals for the Fifth Circuit and this Court, and Battaglia’s own representations to the state court, Battaglia made no attempt

to obtain federal funding under § 3599 for any sought investigative assistance that was denied by the state court when it could have assisted the experts in making their evaluations and providing evidence to the state court.”). Battaglia attempts to place the blame on the state court by arguing that it repeatedly pushed his case forward as fast as possible. Petition at 10–13.

His argument is also inconsistent with the statements he made to the district court. The district court ordered Battaglia to address whether his failure to request the funds from the court constituted waiver. Battaglia responded:

Battaglia could have presented his current request for investigative funding after his request on July 29, 2016 and before it received evidence on November 14-15, 2016. However, Battaglia was already in state court, and was not required to come back to federal court during the state-court proceedings to request funds.

DE 12 at 5.

The federal district court also found the following:

In granting a stay to allow newly appointed counsel to investigate and present a competency challenge to the state court, the Court of Appeals instructed counsel, “[i]t is the present counsel’s responsibility now appointed to take the case he has—and that may be developed during the time gained—to state court. Fear of not prevailing is no excuse to ignore the state court’s primary right of first decision.” *Battaglia v. Stephens*, 824 F.3d [at] 476 []. This instruction was based on the determination that Battaglia could return and present his challenge to the state court.

Though Battaglia’s *Ford* claim appears to be unexhausted, he may return to state court and file an Article 46.05 petition. As Battaglia notes, there is no procedural

barrier or time limit that would prevent him from taking this step. And the plain language of § 3599(e) expressly provides that Battaglia would be entitled to the assistance of federal counsel—supported by federal funding—during this proceeding.

Id. at 474-75. Based on that observation, this Court assured Battaglia that it “would grant funding that is shown to be reasonably necessary to ‘file an Article 46.05 petition’ in the state court,” and provided guidance on what would be required to make that showing in this case. Order, doc. 3, 2-3.

Battaglia’s own motion in the state court referenced these assurances of the availability of federal funding, and expressed his intent to return to federal court for funding if the state court “decides it cannot fully fund the necessary experts,....” Mot. Inv., App.006. Despite the federal court assurances and his own representations before the state court, Battaglia did not return to this Court to seek funding for the sought investigative assistance that was denied by the state court on July 29, 2016, until 2018, long after the state court concluded its hearing and the Court of Criminal Appeals ultimately denied relief. Battaglia’s current request to fund investigative assistance comes too late to have any impact on the expert evaluations that were made and the testimony that was presented to the state court on November 14–15, 2016. Therefore, it is not being sought “to ‘file an Article 46.05 petition’ in the state court.” Order, 3 (quoting *Battaglia*, 824 F.3d at 474).

Battaglia v. Davis, 2018 WL 550518 at *4–*5. Therefore, Battaglia failed to abide by the Fifth Circuit’s admonitions to acquire the funding “during the time gained,” even though he advised the state court he would return to federal court *before* the state court hearing if need be.

Finally, Battaglia had over seven months after the Fifth Circuit granted him a stay to secure funding before the state court hearing. The notion that

he was could not have done so, or that his investigation was “thwarted,” does not hold up to scrutiny.

B. Battaglia’s claim that he was forced to essentially prove his claim before being granted investigative services is meritless.

Battaglia states:

When courts do **not** allow funding for services as the courts below did, but then conclude that a petitioner failed to present evidence that the funding may have produced, the courts create a precondition for funding that violates the plain language of § 3599(f). Section 3599(f) was enacted to enhance representation for a capital defendant and ensure that potentially meritorious claims are investigated and litigated. A claim **cannot** be litigated before it is investigated. A “procedure” that does **not** allow funding for auxiliary services based on a conclusion that the claim has no merit before the litigant has had a chance to investigate the claim violates § 3599(f) and due process.

Petition at 19 (emphasis in original). This allegation lacks merit because, as shown above, Battaglia could have secured investigative funds from the lower court had he asked before his competence claim was litigated. His failure to do so shows a lack of diligence on his part, not a violation of Section 3599(f).

Moreover, the federal district court’s denial was not premised on Battaglia failing to show that the sought services were worthwhile; instead, the court’s decision stemmed from the limitations on the consideration of new evidence under § 2254 and *Pinholster*. The court did not engage in any significant discussion related to the merits or the substance of his request.

However, even if the court had, Battaglia's claim still fails. The acquisition of historical/mitigating evidence has little to no bearing on whether Battaglia is presently competent. See Petition at 19 (explaining that investigative services were needed to investigate, in part, Battaglia's psychosocial history and background). It follows that granting a motion so that Battaglia can develop evidence irrelevant to the present issue is unwarranted. Battaglia complains: "Rather than correct this abuse of discretion, the Fifth Circuit decided that Battaglia should not be allowed to investigate and present relevant factual allegations that investigative services would uncover." Petition at 19–20. However, (1) Battaglia is to blame for any failure to investigate and (2) the lower court's decision was premised on *Pinholster* and this Court's settled precedent, not whether any evidence obtained might be meritorious. The Fifth Circuit recognized that any new information would "likely have little sway on the determination of [Battaglia's] present competence to be executed." *Battaglia v. Davis*, No. 18-70002 at 5. But the court explained:

That is not the point. Battaglia's current request for funding comes on the eve of his execution, after the CCA has already affirmed the state trial court's finding based on a full hearing that Battaglia is competent to be executed. As the district court correctly noted, Battaglia's current funding request "comes too late to have any impact on the expert evaluations that were made and the testimony that was presented" in the state competency proceedings."

Id. This decision forecloses Battaglia's arguments.

Finally, as stated, Battaglia has received all that he is entitled to per *Panetti*. He was entitled to nothing more.

C. Battaglia's claim that he should be allowed to proceed even if this Court concludes investigative services are not needed has no merit.

Battaglia argues:

Should this Court conclude that investigative services are not needed, Battaglia should be allowed to at least proceed to petition for writ of habeas corpus in federal court and present arguments that one of the statutory exceptions to the relitigation bar of 28 U.S.C. § 2254(d) (2017) exist. Otherwise, a complete denial of representation on the 2254(d)-issue will occur since the federal courts below effectively answered the Question Presented without input from the petitioner or his counsel.

Petition at 30. The flaw with this argument is obvious: Battaglia could have and should have filed a § 2254 petition in the district court after the CCA affirmed the trial court's decision. His claim has been that he was prevented from doing so due to lack of investigative services. If he is capable of filing a § 2254 petition now without these services, he was capable a month ago. Battaglia's lack of diligence on this matter is not grounds for certiorari review.

III. The Federal District Court's Denial Was Not an Abuse of Discretion Because Investigative Services Would Only Support a Meritless Claim.

The state court finding that Battaglia is competent to be executed is a factual finding entitled to a presumption of correctness under § 2254(e)(1).

Patterson v. Dretke, 370 F.3d 480, 484 (5th Cir. 2004); *see also Barnard v. Collins*, 13 F.3d 871, 874 (5th Cir. 1994). Battaglia cannot rebut the accuracy of this finding by clear and convincing evidence. Thus, it is entitled to deference under the AEDPA. *See Panetti*, 551 U.S. at 953–54 (federal court can resolve claim without AEDPA deference only when state court adjudication is dependent on an antecedent unreasonable application of federal law, under § 2254(d)(1)).

To be competent for execution, a prisoner must “know the fact of [his] impending execution and the reason for it.” *Ford*, 477 U.S. at 422 (Powell, J., concurring). And whether in terms of “awareness” of an execution or “why” it is to occur, prisoners must have a “rational understanding of the reason for the execution.” *Panetti*, 551 U.S. at 958.

Battaglia’s underlying claim hinges on the findings by three of the experts—Drs. Mosnik, Proctor and Allen—that Battaglia suffers from delusional disorder of the persecutory type and that he is not malingering. Battaglia’s merits argument amounts to this: the majority of the experts found him incompetent, thus he must be incompetent. But this argument disregards context and views these opinions in isolation, even though a complete review of the evidence reveals that the state trial court and CCA rendered the correct conclusion.

First, the trial court did not simply rely on the reports and testimony from the four experts. Rather, the court also considered Battaglia's motions; his TDCJ records; Dallas County Jail records; a pretrial interview of Battaglia by former WFAA reporter Cynthia Vega; an excerpt of 2014 interview of Battaglia by Dallas Morning News reporter Sarah Mervosh; a March 2016 interview of Battaglia by documentarian Thomas Leader; an August 2016 interview of Battaglia by a reporter from WFAA news; recordings of jail calls made by Battaglia while incarcerated at the Dallas County Jail prior to the competency hearing; Battaglia's *pro se* filings in federal court; and all other evidence offered at the hearing. *Battaglia v. State*, 2017 WL 4168595 at *18.

Second, the CCA held that the trial court did not abuse its discretion in disregarding Dr. Mosnik's opinion. The CCA agreed with the trial court that Dr. Mosnik had limited forensic experience and had never testified on behalf of the State. More importantly, the court found that her opinion about Battaglia's delusions were vague, non-specific, and all self-reported. *Id.* at *25 (emphasis in original). Further, of the four experts, Dr. Mosnik was the only one who concluded that Battaglia did not have a personality disorder and was the only doctor to find that Battaglia had bipolar disorder. 1 RR 33–35, 87–88, 169, 170, 173; 2 RR 31; DX-2 at 18.⁷ The latter finding is significant because

⁷ “RR” refers to the reporter's record of the state court evidentiary hearing on competency, preceded by volume number and followed by page number(s). “DX”

it highlighted one of the difficulties of reaching a conclusion about competency based solely on expert majority opinion. At Battaglia’s trial, all of the experts agreed that Battaglia had some form of bipolar disorder, and yet three of the four current experts did not render that finding. In fact, Dr. Proctor concluded that Battaglia was likely misdiagnosed at trial. 1 RR 108. This substantial conflict clearly puzzled the trial court, which questioned the reliability of such diagnoses. 2 RR 114–16.

Third, the CCA held that the trial court’s decision to disregard Dr. Proctor’s conclusion “was not outside the zone of reasonable disagreement.” *Battaglia v. State*, 2017 WL 4168595 at *26. The issue here primarily involved Dr. Proctor’s testimony that Battaglia has the “highest possible incentive to malingering (i.e. to avoid death),” the intellectual capacity to malingering, and sufficient intelligence to fake symptoms of persecutory delusions. *Id.* at *25. The CCA further held that because the trial court had the discretion to assess Dr. Proctor’s credibility, it was reasonable for the trial court to discount Dr. Proctor’s opinion that Battaglia’s self-reported belief in the complex conspiracy against him “prevented him from having a *rational* understanding of the reason for his execution . . . [s]ince there is evidence in the record that Battaglia is malingering and that he does have a rational understanding of the

refers to the exhibits offered by Battaglia at the hearing, followed by exhibit and page number(s) and page number(s).

reason for his execution.” *Id.* at *26 (emphasis in original).

Fourth, the trial court concluded that Drs. Mosnik, Proctor and Allen ignored DSM criteria that delusional beliefs are those not normally accepted by other members of one’s subculture, stating that “since claims of wrongful prosecution and conspiracies by judges, witnesses, prosecutors, and defense attorneys are common and normally accepted within a prison subculture, that belief by Battaglia is not a ‘delusion.’” *Id.* The trial court cited to *Wood v. Thaler*⁸ for this proposition, *Battaglia v. State*, 2017 WL 4168595 at *26–27, and found the two cases to be similar.

Fifth, as the CCA noted, Dr. Allen—who originally found Battaglia incompetent—substantially backed off his finding at the hearing, testifying that Battaglia *may* not have a rational understanding under *Panetti*. 1 RR 204. At the hearing, Dr. Allen testified that he was troubled by the “areas of inconsistency” and “by the lack of psychiatric context in TDC over the course of 14 and a half years.” 1 RR 167. He had concerns and was skeptical because, over the past fourteen and a half years, Battaglia has had “no psych referrals.” 1 RR 164. Battaglia’s mental status reports were normal, and he had not complained to anybody in the prison system about these delusions. *Id.* According to Dr. Allen, “you would think that if he were that severely

⁸ 787 F.Supp.2d 458, 480–85 (W.D. Tex. 2011).

delusional, surely he would be having psych visits.” *Id.* The fact that there were no referrals was inconsistent with his interview of Battaglia. 1 RR 164–65. Dr. Allen was also bothered by Battaglia’s inconsistent versions of whether or not he actually committed the offense. 1 RR 172. Further, the trial court asked Dr. Allen for his opinion regarding the fact that Battaglia read *Panetti*. 1 RR 206–07. Dr. Allen testified that “something like that would give you pause” and “if he can digest things like *Panetti*, you have to wonder the extent to which he’s styling his presentation, let’s say, in terms of his negative response bias.” 1 RR 207.

Sixth, the CCA set forth the evidence provided by Dr. Womack which the trial court relied on, specifically evidence of malingering; that Battaglia was sufficiently intelligent to fake test results; that Battaglia’s claim of delusions was unsupported by TDCJ personnel; that Battaglia’s comments about the legal system and his ex-wives did not reflect a true delusional disorder; that Battaglia did have features of a personality disorder relating to narcissistic and anti-social areas; that Battaglia had changed his story about the reason he is to be executed, which does not reflect a fixed delusional disorder; that Battaglia understands that he was convicted of murdering his daughters, that he has an execution date and that someone who was convicted of such a crime should receive the death penalty; and that since Battaglia has told different versions of his offense, admitting all or some culpability, his denials are

inconsistent. The CCA then stated:

The trial court concluded based upon Dr. Womack's assessment, along with its own review of the evidence, that Battaglia is intelligent, sophisticated, and motivated enough to invalidate the mental health tests and create delusions reflecting that he does not have a rational understanding of his connection to the offense as a means of preventing his execution. The trial court concluded that Battaglia is malingering and does not suffer from a severe mental illness. The trial court believes that Battaglia is feigning or exaggerating his symptoms of mental illness. We hold that these findings of fact are supported by the record and are within the zone of reasonable disagreement.

Battaglia v. State, 2017 WL 4168595 at *27.

Finally, the CCA conducted an exhaustive summary of the state and federal case law regarding competency to be executed. *Id.* at *5–*17. It then compared Battaglia to the inmates found to be competent and those found incompetent and noted the similarities between Battaglia and the former and dissimilarities between Battaglia and the latter. *Id.* at *28–*29. The CCA concluded:

Recognizing that it was within the trial court's discretion to evaluate the weight and credibility of the conflicting evidence, we hold that the record supports the trial court's determination that Battaglia is competent to be executed. Battaglia knows he is to be executed by the State, he knows he was convicted of killing his daughters, and he knows his execution is imminent. There is support in the record that Battaglia is malingering. Even though he denies being involved in the murders of his daughters, there is evidence in the record supporting the conclusion that he comprehends that there is a "causal link" between the capital offense and his imminent execution beyond merely identifying the State's articulated rationale for the execution.

Id. at *29. In sum, the evidence in this case involved much more than simply the conclusions of three doctors versus the conclusion of one. Viewing all of the evidence and testimony in context, the state court's decision was not an unreasonable application of Supreme Court law to the facts. An investigation would only support a meritless claim. Thus, even though the lower courts did not address the merits, certiorari review is also not merited on these grounds. its decision was not an abuse of discretion.

IV. Investigative Services Would Provide Irrelevant Evidence or Merely Supplement Prior Evidence.

Although Battaglia explains in general terms what he seeks via a mitigation investigator, it is arguable that the evidence he seeks does not differ in any significant manner from the abundant evidence the state court and the four experts considered. In other words, he cannot show that his request would not merely supplement that already reviewed. As the Fifth Circuit stated: "Much of this information sought about Battaglia's past would likely have had little sway on the determination of his present competence to be executed." *Battaglia v. Davis*, No. 18-70002 at 5.

Of course, the true problem with Battaglia's request is that it is not tailored to the underlying issue of his present competency. Again, he seeks historical evidence about Battaglia's past, including interviews with friends and family, but he never sufficiently explains how such evidence is related to

his current mental state. In this regard, his request has the appearance of a fishing expedition, in that he hopes to discover evidence more than tangentially or hypothetically related to his competency claim. *See Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000) (holding that habeas discovery rules do not authorize fishing expeditions). It follows that the lower court’s decision was correct.

V. Battaglia Should Be Denied a Stay of Execution.

A stay of execution is an equitable remedy. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). “It is not available as a matter of right, and equity must be sensitive to the State’s strong interest in enforcing its criminal judgments without undue interference from the federal courts.” *Id.* (citing *Nelson v. Campbell*, 541 U.S. 637, 649-650 (2004)). In deciding whether to grant a stay of execution, the Court must consider four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991).

“The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion.” *Nken*, 556 U.S. at

433-34 (citations omitted). Such a showing requires an applicant to demonstrate more than good faith or just the absence of frivolity on the part of the petitioner. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The Supreme Court “places considerable weight on the decision reached by the courts of appeals in these circumstances.” *Id.* at 896. This Court reviews a district court’s decision for abuse of discretion. *Adams v. Thaler*, 679 F.3d 312, 318 (5th Cir. 2012) (citing *Delo v. Stokes*, 495 U.S. 320, 322 (1990)).

First, as explained above, Battaglia is not likely to succeed on the merits. The CCA’s thorough analysis demonstrates that Battaglia’s competency allegation is unavailing.

Second, Battaglia will not be irreparably injured absent a stay. New evidence would only supplement prior evidence or is wholly irrelevant to Battaglia’s competency. Battaglia also received all the assistance he is entitled to under *Ford* and *Panetti*. Most importantly, a stay pending an investigation is futile since the federal court cannot consider new evidence under *Pinholster*.

Third, a stay will result in injury to the State’s interest because Battaglia’s execution has been postponed twice before, to the dismay of the victims’ relatives. The State also has a substantial interest in bringing an end to these proceedings and seeing that Battaglia’s punishment is carried out. This is also where the public interest lies. Moreover, the State is not responsible for Battaglia’s claimed predicament because had he simply

requested the investigative funds from the lower court, he would have received them. He is now seeking further delay due to his own negligence at the expense of the State and the victims. *Nelson*, 541 U.S. at 649 (this Court “may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief”); *Martel v. Clair*, 565 U.S. 648, 662 (2012) (“Protecting against abusive delay *is* an interest of justice.”) (emphasis in original); *Reese v. Livingston*, 453 F.3d 289, 291 (5th Cir. 2006) (“As we read *Hill*, a plaintiff cannot wait until a stay must be granted to enable him to develop facts and take the case to trial—not when there is no satisfactory explanation for the delay.”).

As a final matter, Battaglia argues that this Court should grant him a stay pending this Court’s resolution of its grant of certiorari review in *Ayestas v. Davis*, No. 16-6795 (U.S.). Petition at 21–22. The issue presented in *Ayestas* is as follows:

Whether the Fifth Circuit erred in holding that 18 U.S.C. § 3599(f) withholds “reasonably necessary” resources to investigate and develop an ineffective-assistance-of-counsel claim that state habeas counsel forfeited, where the claimant’s existing evidence does not meet the ultimate burden of proof at the time the Section 3599(f) motion is made.

Battaglia claims that his allegation “is identical to the claim in *Ayestas* concerning the deprivation of Battaglia’s right to ‘meaningful and quality’ legal

representation that 18 U.S.C. § 3599 affords him.” Petition at 48. Battaglia is incorrect.

In *Ayestas*, the funding issue under § 3599(f) involved an unexhausted and procedurally defaulted ineffective-assistance-of-trial-counsel claim. Upon remand from the Fifth Circuit for reconsideration of the issue in light of *Martinez*⁹ and *Trevino*,¹⁰ *Ayestas* filed a motion for investigative assistance under § 3599(f). However, the district court determined the claim to be meritless, even though there was no state court adjudication, and denied investigative assistance because it was not “reasonably necessary.” *Ayestas v. Stephens*, 817 F.3d 888, 893–94 (5th Cir. 2016).

The instant case is not similar because Battaglia’s claim is obviously exhausted and adjudicated on the merits by the state court. The *Martinez/Trevino* component to *Ayestas* is absent here. And Battaglia was assessed by four experts and had a two-day hearing. Under *Ford* and *Panetti*, he was entitled to no more. Further, mitigation services are irrelevant to Battaglia’s current competency, as explained. In *Ayestas*, on the other hand, *Ayestas*’ chief allegation was an unexhausted claim that trial counsel was ineffective for failing to investigate and present mitigating evidence. 817 F.3d

⁹ *Martinez v. Ryan*, 566 U.S. 1 (2012).

¹⁰ *Trevino v. Thaler*, 569 U.S. 413 (2013).

at 893. Clearly, services of a mitigation expert under § 3599(f) are far more essential in that context.

Moreover, at no point did the federal district court use the language “substantial need” in its order denying Battaglia’s motions. Instead, the lower court repeatedly used the language “reasonably necessary.” *Id.* The difference between “substantial need” and “reasonably necessary”—the former being a term the Fifth Circuit has used, whereas the latter tracks the language of § 3599(f)—is at the core of this Court’s grant of certiorari review in *Ayestas v. Davis*. Because the lower courts did not employ the language “substantial need,” that further represents a major distinction warranting denial of a stay.

At any rate, the Fifth Circuit has held that it is not authorized to stay an execution merely because this Court may, at some point in the future, write an opinion that would be helpful to Battaglia. *See In re Edwards*, 676 F. App’x 319, 323 (5th Cir.) (citing *Berry v. Epps*, 506 F.3d 402, 405 (5th Cir. 2007) (denying stay of execution despite grant of certiorari in other case)), *cert. denied*, 137 S. Ct. 910 (2017). Thus, the grant of certiorari in *Ayestas* does not warrant a stay.

CONCLUSION

For the above reasons, the Director respectfully requests that Battaglia's petition for writ of certiorari and motion for stay of execution be denied.

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